Supreme Court, U. S.
FILED
MAR 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-1178

In the Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE SHIPYARDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1178

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE SHIPYARDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

1. Respondents Jacksonville Shipyards and its insurance carrier contend (Br. in Opp. 1-4) that the Director has no "standing" to petition for a writ of certiorari in this Court. In support of this proposition, respondents cite Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921, which provides that an appeal can be taken to a court of appeals by "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board." That provision, respondents contend, deprives the Director of the authority to seek review in this Court.

This contention is wrong for two reasons. First, it was respondents, not the Director, that sought review in the court of appeals. The claimant and the Director prevailed before the Board, and respondents, "person[s] adversely affected or aggrieved" by that order, were entitled under

Section 21(c) to seek review in the court of appeals, where the Director was named and participated as a respondent. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977). The decision on which respondents rely, *Director, Office of Workers' Compensation Programs* v. *Donzi Marine, Inc.*, 586 F. 2d 377 (5th Cir. 1978), is inapposite. In that case it was the Director who sought review of a Board order in the court of appeals. The court there held that the Director was not a party "adversely affected or aggrieved" under the provisions of Section 21(c) of the Act. *Donzi Marine*, even if correct, has no application to a case such as this one in which it is the employer and its insurer who have sought review in the court of appeals.

Section 21(c) also is irrelevant for the simple reason that it applies only to review in the court of appeals; it does not apply to review in this Court, which is governed by 28 U.S.C. 1254(1). Section 1254(1) permits "any party" to a civil or criminal case to petition for a writ of certiorari. The Director was a party in the court of appeals[1] and is therefore entitled by statute to petition for review in this Court.

Finally, contrary to respondents' suggestion (Br. in Opp. 4), the Director is not seeking an "advisory opinion" in this case. The claimant's eligibility for benefits turns on the result of this case, even though the claimant has not filed his own petition for certiorari.

2. Respondent further contends (Br. in Opp. 4) that this is "a case of first impression." As we stated in the petition, however, the decision in this case conflicts with decisions in several other circuits. The Third Circuit has held that the maritime situs provision in the Longshoremen's Act extends to a public street in a large marine terminal area, *Sea-Land Service, Inc.* v. *Director,*

[1]See United Brands Co. v. *Melson*, 569 F. 2d 214 (5th Cir. 1978).

Office of Workers' Compensation Programs, 540 F. 2d 629 (3d Cir. 1976), and to a structural steel fabrication shop located some 2000 feet from the water's edge, *Dravo Corp.* v. *Maxin*, 545 F. 2d 374, 381 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977) . The Ninth Circuit has held that the situs provision applies to a gear and storage repair facility located 2600 feet from the water and 2050 feet outside the entrance to the Port of Longview, Washington. *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 141 (9th Cir. 1978). And the First Circuit has held that the Boston Army Base, where the claimant was stripping containers that had been unloaded from a ship several hundred feet away, was a maritime situs within the meaning of the Act. *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F. 2d 264, 272 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). Accordingly, this case presents a question on which the courts of appeals are divided: whether the maritime situs requirement is satisfied when a maritime employee is injured in the course of his employment within a large maritime facility, but not at a place used for the performance of maritime work.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979